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In The

Supreme Court of the United States

October Term, 1994

RUSSELL B. MARKS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

THOMAS A. SHEEHAN
SHUGHART THOMSON & KILROY
A Professional Corporation
Twelve Wyandotte Plaza
120 W. 12th Street
Kansas City, Missouri 64105
(816) 421-3355
Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

Pursuant to 21 U.S.C. § 841, Congress has created seven separate sentencing ranges for federal drug offenders based on the amount of drugs involved in the offense and the defendant's number of prior convictions. The questions presented here are:

1. Whether the prosecution has to prove the amount of drugs at sentencing by more than a preponderance of the evidence when the amount greatly increases the mandatory minimum sentence by triggering an entirely new range of sentences applicable to the offense; and

2. Whether the district court satisfies the requirements of Fed. R. Crim. P. 11(c)(1) when it informs a defendant at the plea hearing that the maximum sentence he could face is 20 years to life, but the amount of drugs proved at sentencing requires the court to impose a mandatory life sentence without release?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED IN THE CASE 3

STATEMENT OF THE CASE 6

REASONS FOR GRANTING THE WRIT 8

I. The Decision Below Conflicts in Principle with This Court's Decision in *McMillian v. Pennsylvania* and Directly Conflicts with the Third Circuit's Decision in *United States v. Kikumura* 8

II. The Decision Below Raises Important Issues Regarding the Trial Court's Obligations Under Fed. R. Crim. P. 11(c)(1) in Drug Cases Where the Amount of Drugs Involved, Although Not an Element of the Offense, Plays a Significant Role in Determining the Sentence 11

CONCLUSION 14

APPENDIX A-1

TABLE OF AUTHORITIES

Page

Cases

McMillian v. Pennsylvania, 477 U.S. 79 (1986)... 8, 9, 10, 11

United States v. Galloway, 976 F.2d 414 (8th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1420 (1993) 9

United States v. Kikumura, 918 F.2d 1084 (3d Cir. 1990) 8, 9, 10

United States v. Marks, 38 F.3d 1009 (8th Cir. 1994) 2

Statutes

21 U.S.C. § 841 ..... 3, 7, 10, 11

21 U.S.C. § 851(c)(1) 11

28 U.S.C. § 1254(1) 2

Other Authorities

Fed. R. Crim. P. 11(c)(1) 5, 11, 12, 13

Supreme Court Rule 13.1 2

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Russell B. Marks respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on October 27, 1994, in order to resolve the conflict between the Eighth and Third Circuits and to decide the issue of fundamental importance presented here.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit that gives rise to this petition is

reported at *United States v. Marks*, 38 F.3d 1009 (8th Cir. 1994), and is reprinted in Appendix A hereto ("App. A") at p. A1. By order filed December 12, 1994, the Eighth Circuit denied Marks' petition for rehearing and suggestion for rehearing en banc. App. B, B1.

JURISDICTION

Russell B. Marks pleaded guilty to one count of conspiracy to distribute cocaine and one count of conspiracy to launder monetary instruments. The district court sentenced Marks to a mandatory life sentence without release on the drug charge and to five years imprisonment of the money laundering charge. The court also imposed a ten-year term of supervised release.

On October 27, 1994, the Eighth Circuit entered an order affirming Marks' convictions and the mandatory life sentence. A timely-filed petition for rehearing and suggestion for rehearing en banc was denied on December 12, 1994. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

21 U.S.C. § 841(b) provides in relevant part:

(b) **Penalties**

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving –

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

(viii) 100 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 1 kilogram or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If

any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. . . .

Fed. R. Crim. P. 11(c)(1) provides in relevant part:

(c) Advice to defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole term or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the

court may also order the defendant to make restitution to any victim of the offense;

STATEMENT OF THE CASE

Russell Marks was charged in a multicount indictment with conspiracy to distribute cocaine (count 1) and conspiracy to launder monetary instruments (count 3). Count 1 alleged that the conspiracy involved a "detectable amount of cocaine." Immediately before trial, Marks informed the court that he wished to plead guilty to Counts 1 and 3.

The following dialogue then took place:

The Court: Now, even though the sentences will come under the sentencing guidelines, it is necessary that I advise you of the maximum sentence that could be imposed under the statute.

As I understand it, under the statute, depending somewhat upon the facts developed, you could be sentenced up to 20 years to life or fined up to $8 million and there might be a period of supervised release of not less than 10 years.

Prosecutor: Now –

Maximum is mandatory life under Count 1, and that would be the very maximum number, and that's dependent upon the prior drug convictions.

The Court: That's what I indicated to him dependent upon prior drug convictions –

now, dependent upon that, the maximum sentence might be mandatory life.

Do you understand that?

The Defendant: Yes, sir.

After the court accepted Mr. Marks' guilty plea, it directed the probation officer to prepare a presentence investigation report (PSI).

The PSI stated in relevant part that "[a]gents estimated that during the course of the instant conspiracy, Marks distributed at least 15 kilograms of cocaine. . . . " PSI at 6 ¶ 28. Marks objected to this and numerous other factual allegations in the PSI. Marks argued that he had not pleaded guilty to any offense involving more than 5 kilograms of cocaine and that if the government was to be allowed to prove additional quantities not alleged in the indictment, he should be allowed to withdraw his plea. *Id.* at 4-5, 7-8.

At the sentencing hearing Marks again argued to the court that there was a misunderstanding as to what he had pleaded guilty to. He stated that he had not been charged with, and had not pleaded guilty to, distributing fifteen kilograms of cocaine. Marks stated that the 15 kilograms mentioned in the PSI had not been alleged in the indictment, that he had not been given notice of that amount and that he had not pleaded guilty to conspiring to distribute that amount (SH 6).

After the government presented its evidence the court stated that it was plain that there was more than five kilograms of cocaine involved in the conspiracy. Consequently, based on 21 U.S.C. § 841(b)(1)(A), the court

was required to sentence Marks to a mandatory life sentence without release on count 1.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts in Principle with This Court's Decision in *McMillian v. Pennsylvania* and Directly Conflicts with the Third Circuit's Decision in *United States v. Kikumura*

Russell Marks was sentenced to mandatory life imprisonment with no release because his offense involved more than five kilos of cocaine and because he had at least two prior convictions. In its opinion, the Eighth Circuit rejected Marks' argument that because the amount of cocaine involved in the conspiracy determined the statutory parameters of his sentence, the amount should have been proved by more than a preponderance of the evidence. The Court stated, "[i]t is clear, however, that we have 'rejected the argument that the sentencing phase requires a more stringent standard of proof than a preponderance of the evidence.' " App. A, A10 (citation omitted).

The Eighth Circuit's blanket assertion that more than a preponderance of the evidence is *never* required conflicts in principle with this Court's decision in *McMillian v. Pennsylvania*, 477 U.S. 79 (1986), and conflicts directly with the Third Circuit decision in *United States v. Kikumura*, 918 F.2d 1084 (3d Cir. 1990).

In *McMillian*, the Court stated that the Due Process Clause of the Fourteenth Amendment may require that

sentencing factors be proved by more than a preponderance of the evidence where the sentencing factor becomes "the tail which wags the dog of the substantive offense." 477 U.S. at 88. Although the Court did not explain this statement, lower courts have interpreted it to mean that sentencing factors should be proved by more than a preponderance when they greatly enhance a defendant's sentence.

In *Kikumura*, for example, the Third Circuit held that sentencing factors that increased a defendant's sentence from 30 months to 30 years had to be proved by clear and convincing evidence. 918 F.2d at 1100. The court stated that "[t]his is perhaps the most dramatic example imaginable of a sentencing hearing that functions as 'a tail which wags the dog of the substantive offense.' " *Id.* at 1100-1101 (citing *McMillian*, 477 U.S. at 88).

Because the sentence received by Mr. Marks was so greatly increased as a result of the sentencing factors, those factors should have been proved by more than a preponderance of the evidence. But rather than analyze whether Mr. Marks was entitled to greater due process protection, the court below simply issued a blanket pronouncement that greater protection will *never* be required in the Eighth Circuit.[1]

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[1] The decision below also conflicts with a prior *en banc* decision of the Eighth Circuit. In *United States v. Galloway*, 976 F.2d 414 (8th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1420 (1993), the court stated that "a sentencing scheme *could* violate due process if the sentencing factors exposed the defendant to 'greater or additional punishment' beyond that provided under the statute of conviction." *Id.* at 425 (citing *McMillian*, 477 U.S. at 85) (emphasis added).

The Eighth Circuit's holding conflicts with *McMillian* and *Kikumura* on an issue on which there should be no conflicts. Congress' enactment of the United States Sentencing Guidelines signaled a new era in federal criminal law. No longer should the length of criminal sentences depend on the philosophy of the judges hearing the case. Uniformity of sentences is now the rule rather than a lofty goal.

The Eighth Circuit's opinion violates this policy of national uniformity. Criminal defendants in the Eighth Circuit will be sentenced based on sentencing factors proved by a mere preponderance of the evidence, while defendants in the Third Circuit may be entitled to greater constitutional protections. The natural result of these conflicting rules can only be disparate sentences – the very goal Congress sought to avoid.

This disparity will be most noticeable in sentences of drug offenders such as Marks. Mr. Marks was sentenced under 21 U.S.C. § 841(b), which contains seven separate sentencing ranges. Under that section, no term of imprisonment beyond the statutory minimum range is applicable until the amount of drugs is proved. Accordingly, any sentence above the minimum range depends *entirely* on the amount of drugs involved in the conspiracy. Under § 841(b) the range itself is determined by the amount of drugs involved in the offense. Indeed, Marks' mandatory life sentence became applicable only after the

government proved that 5 or more kilograms were involved in the offense. 21 U.S.C. § 841(b)(1)(A).[2]

In *McMillian*, the sentencing factor "neither alter[ed] the maximum penalty for the crime committed nor create[d] a separate penalty; it operate[d] solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it. . . . " 477 U.S. at 87-88. The sentencing factors in the present case, however, do not simply limit the sentencing court's discretion within a statutory range – they *determine the range itself.* Because the amount of drugs involved in the offense plays such a significant role in sentences under § 841, the burden of proof should be uniform nationwide.

The Court should grant the petition to decide this important issue.

II. The Decision Below Raises Important Issues Regarding the Trial Court's Obligations Under Fed. R. Crim. P. 11(c)(1) in Drug Cases Where the Amount of Drugs Involved, Although Not an Element of the Offense, Plays a Significant Role in Determining the Sentence

Defendants indicted on federal drug charges are faced with an insurmountable task when they wish to plead guilty. They must not only *predict* the quantity of

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[2] The only other factor in Marks' life sentence was the number of prior convictions he had. The government was required to prove that number beyond a reasonable doubt. *See* 21 U.S.C. § 851(c)(1).

drugs the government will prove at the sentencing hearing, but also compute the likely sentence to be imposed based on that quantity. Although the trial court is required to inform the defendant of the mandatory minimum sentences he faces at the plea hearing, *see* Fed. R. Crim. P. 11(c)(1), as a practical matter the court cannot do so. The facts of the present case illustrate this problem.[3] At the plea hearing the court and the prosecutor informed Mr. Marks that the maximum sentence he could receive was life imprisonment. The court stated:

The Court: Now, even though the sentences will come under the sentencing guidelines, it is necessary that I advise you of the maximum sentence that could be imposed under the statute.

As I understand it, under the statute, depending somewhat upon the facts developed, you could be sentenced up to 20 years to life or fined up to $8 million and there might be a period of supervised release of not less than 10 years.

Now –

Mr. Johnson: *Maximum is mandatory life under Count 1, and that would be the very maximum number, and that's dependent upon the prior drug convictions.*

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[3] The Eighth Circuit acknowledged that the trial court did not inform Mr. Marks of the mandatory minimum sentence he faced. App. A, A8.

The Court: *That's what I indicated to him dependent upon prior drug convictions – now, dependent upon that, the maximum sentence might be mandatory life.*

At the sentencing hearing, however, the court stated that because of the amount of drugs involved in the offense and Mr. Marks' past criminal history, the *only* sentence applicable was mandatory life without release. Although Marks was informed that life imprisonment was the maximum sentence he *could* receive, in reality life imprisonment was the *mandatory minimum* sentence he *would receive*. But the district court could not inform Marks of the correct mandatory minimum sentence at the plea hearing because it was based on evidence not before the court – the amount of drugs involved in the offense. This case shows that the requirements of Fed. R. Crim. P. 11(c)(1) are nearly impossible to follow where, as here, the government alleges a small amount of drugs in the indictment, but later proves a large amount at sentencing.

The Eighth Circuit erred when it held that Mr. Marks' rights were protected when the trial court informed him that the *maximum* sentence he faced was life imprisonment. The trial court plainly failed to inform Marks of the mandatory minimum, for the simple reason that it had no way to know what the mandatory minimum would be. The Court should grant the petition to guide the district courts in plea hearings in federal drug cases.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

THOMAS A. SHEEHAN
SHUGHART THOMSON & KILROY
A Professional Corporation
Twelve Wyandotte Plaza
120 W. 12th Street
Kansas City, Missouri 64105
(816) 421-3355
Attorney for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-2017

United States of America, Appellee, v. Russell B. Marks, Appellant.	*	Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: December 14, 1993

Filed: October 27, 1994

Before McMILLIAN, FAGG, and BOWMAN, Circuit Judges.

BOWMAN, Circuit Judge.

Russell Bradley Marks pled guilty to one count of conspiracy to distribute cocaine, a violation of 21 U.S.C. § 846, and one count of conspiracy to launder money, a violation of 18 U.S.C. § 371. He appeals both of the resulting convictions and his mandatory life sentence on the cocaine conviction. We affirm.

I.

Marks argues that the District Court[1] did not properly inform him of the nature of the charges against him, did not establish a factual basis for his plea of guilty under Count 1 (the cocaine conspiracy count), and did not inform him of the possible sentence he faced under that count.

A.

We first consider Marks' contention that the trial court failed to inform him of the nature of the charges. Rule 11(c)(1) of the Federal Rules of Criminal Procedure requires that the court must "inform the defendant of, and determine that the defendant understands . . . the nature of the charge to which the plea is offered. . . . " Here the District Court addressed Marks and discussed the charges, but did not fully recite them. In determining whether the defendant understood the nature of the charges, it is necessary to "examine the totality of the circumstances. We examine whether the indictment gave him notice of the charge, whether he discussed the charge with his attorney or the judge, and we look at any other facts which are in the record." *United States v. Nieuwsma*, 779 F.2d 1359, 1361 (8th Cir. 1985).

Count 1 accused the defendant of participation in a conspiracy to distribute cocaine. Marks had received notice of this charge in the indictment, testified under

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[1] The Honorable Russell G. Clark, Senior United States District Judge for the Western District of Missouri.

oath that he had counseled extensively with his attorney[2] concerning the charge, and agreed that he understood its nature. *See* Plea Hearing Tr. at 7. Marks' attorney similarly stated that defendant was aware of the meaning of the charge. *Id.* at 7-8. The District Court summarized conspiracy to distribute in simple language before engaging in a discussion with Marks to establish a factual basis for his plea. *Id.* at 11. When a defendant indicates "at the plea hearing that he had read the indictment and understood the charges against him, '[s]uch statements at the plea hearing provide persuasive evidence of an understanding' of the nature of the charges." *United States v. Young*, 927 F.2d 1060, 1064 (8th Cir.) (quoting *Harvey v. United States*, 850 F.2d 388, 396 (8th Cir. 1988)), *cert. denied*, ___ U.S. ___, 112 S. Ct. 384 (1991). The transcript of the plea hearing shows that Marks understood the nature of the charge, Plea Hearing Tr. at 7, while his reference to specific overt acts, *id.*, at 12, 13, satisfies us that he had read the indictment.

Marks further argues with respect to Count 1 that the court erred in failing to inform him that the government would have to prove beyond a reasonable doubt that he had "knowingly and intentionally" conspired with others. It is not always necessary, however, to explain formally the elements of an offense if the defendant understood the nature of the charge. *See Nieuwsma*, 779 F.2d at 1362. Here it is clear that defendant "understood that he was pleading guilty to conspiracy to distribute

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[2] The attorney who was appointed to represent Marks in the District Court proceedings is not the attorney of record in this appeal.

cocaine, and that it involved an agreement to commit a crime, and that he understood the nature of the charge. There was substantial compliance under Rule 11 in this regard." *United States v. Kriz*, 586 F.2d 1178, 1180 (8th Cir. 1978), *cert. denied*, 442 U.S. 945 (1979). In these circumstances, the District Court did not err in failing to explain the government's burden of proof, and adequately informed the defendant of the nature of the charge under Count 1.

The record on Count 3, which charged Marks with conspiracy to launder money, is not as clear. As in the case of Count 1, Marks received notice in the indictment of the charge, testified under oath that he had counseled extensively with his attorney concerning the charge, and stated that he understood its nature. *See* Plea Hearing Tr. at 7. Marks' attorney agreed that Marks was aware of the meaning of the count, while the government's attorney noted that the charge concerned a "conspiracy to launder money derived from drug trafficking." Plea Hearing Tr. at 7-8, 2. The court, however, merely stated with respect to Count 3 that: "It charges that you conducted some financial transactions involving proceeds that you had received and – generally from drug trafficking . . . ," *id.* at 12, before going on to question Marks about specific overt acts alleged under the count. While a clearer statement of the nature of the charge would have been desirable, we cannot say that defendant is entitled to a reversal under the *Young* test. Marks' responses to the court's queries about overt acts, *see id.* at 12, 13, indicate that he had read the indictment, and he testified affirmatively as to his understanding of the charges against him, *id.*, at 7. He had discussed the charges with his attorney, had heard

them stated succinctly by the government's attorney, and had been questioned about them by the court. Examining the totality of the circumstances, we conclude that Marks was adequately informed of the nature of the charge in Count 3.

B.

Marks further argues that his guilty plea should be vacated because the trial court did not establish a factual basis for the plea's acceptance. As only Count 1, the charge of conspiracy to distribute cocaine, is discussed in Marks' brief, we will limit our discussion accordingly.

For the purposes of Rule 11(f) of the Federal Rules of Criminal Procedure, a factual basis for a plea of guilty is established when the court determines there is sufficient evidence at the time of the plea upon which the court may reasonably determine that the defendant likely committed the offense. *See United States v. Boucher*, 909 F.2d 1170, 1175 (8th Cir.), *cert. denied*, 498 U.S. 942 (1990). This determination is satisfied if the transcript described the acts to which the defendant pleaded guilty. *See United States v. Villegas*, 987 F.2d 1362, 1364 (8th Cir. 1993).

In this case, the indictment charged that Marks had conspired with several other named individuals, some of them charged as co-conspirators and some of them mentioned as unindicted co-conspirators, to distribute cocaine. At the plea hearing, the following colloquy took place:

> THE COURT: Now, Count 1 charges, commencing in June of 1987 and continuing to on or about July 1991, you agreed or conspired with

others to distribute a mixture containing cocaine.

During that period of time, did you have some sort of an understanding with other people that you would possess and distribute cocaine?

THE DEFENDANT: Yes, sir.

THE COURT: What was your involvement in this regard?

What was [sic] your duties or obligations in regard to the agreement or the understanding?

What were you supposed to do?

THE DEFENDANT: I really didn't do anything, I guess, except answer the phone. If somebody said they needed something, then, I guess I helped them achieve their goals.

THE COURT: Did you receive some telephone calls from people wanting cocaine?

THE DEFENDANT: Yes, sir I did.

THE COURT: Did you make arrangements to see that they got the [sic]?

THE DEFENDANT: Yes, sir, I did.

Plea Hearing Tr. at 11-12. Conspiracy to distribute does not require that the existence of a formal agreement be demonstrated; " 'showing a tacit agreement by understanding proven wholly by circumstantial evidence or by inferences from the parties' actions is sufficient.' " *United States v. Casas*, 999 F.2d 1225, 1229 (8th Cir. 1993) (quoting *United States v. Searing*, 984 F.2d 960, 964 (8th Cir. 1993)), *cert. denied*, ___ U.S. ___, 114 S. Ct. 894 (1994). At the same

time, some degree of knowing involvement and cooperation beyond mere knowledge must be established. *Casas*, 999 F.2d at 1229. Here, the defendant clearly admitted to an understanding with others to possess and distribute cocaine, establishing his knowing involvement and cooperation in the conspiracy.

Marks refers us to *United States v. Townsend*, 924 F.2d 1385 (7th Cir. 1991), which notes that a drug sale, "by definition, requires two parties; their combination for that limited purpose does not increase the likelihood that the sale will take place, so conspiracy liability would be inappropriate." *Id.* at 1394. *Townsend* also notes, however, that conspiracies "are typically distinguished by cooperative relationships between the parties that facilitate achievement of the goal." *Id.* at 1395. Marks admitted that "[i]f somebody said they needed something, then, I guess I helped them achieve their goals." Plea Hearing Tr. at 11. While we might wish that more had been done to establish a factual basis for Marks' plea on Count 1 in the District Court's colloquy with defendant, we nevertheless believe that what was done is adequate. Accordingly, Marks is not entitled to have his plea vacated on this ground.

C.

We now turn to Marks' contention that his guilty plea should be vacated because the court did not adequately notify him of possible sentences. Rule 11(c)(1) of the Federal Rules of Criminal Procedure states that the court must "inform the defendant of, and determine that the

defendant understands . . . the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term," and "the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances. . . . " In the instant case, Marks was clearly informed that he faced a possible sentence of life imprisonment. Plea Hearing Tr. at 8-9. While the term "mandatory minimum" does not appear in the plea hearing transcript, in discussing Count 1, the court advised Marks that "under the statue, depending somewhat upon the facts developed, you could be sentenced up to 20 years to life or filed up to $8 million and there might be a period of supervised release of not less than ten years." Plea Hearing Tr. at 8.

When a five kilogram mixture of cocaine is involved, and the defendant has a final prior conviction for a felony drug offense, the defendant must be sentenced to a minimum of twenty years in prison. 21 U.S.C. § 841(a)(1), (b)(1)(A). We believe that the trial court's "20 years to life" statement adequately informed the defendant of the possible application of the twenty-year mandatory minimum sentence. Similarly the court informed the defendant that for Count 3 "under the statute, you could [be] imprisoned for not more than five years and fined up to $250,000 or some combination of the two." Plea Hearing Tr. at 8-9. The offense charged in Count 3 does not carry a mandatory minimum sentence. 18 U.S.C. § 371. We conclude that defendant received sufficient notification of both maximum and minimum sentences under the two counts to satisfy the requirements of Rule 11.

II.

Marks argues that the District Court erred in not allowing him to challenge his prior felony drug convictions at the sentencing hearing. When the government establishes two or more such prior convictions and the present offense of conviction involves five kilograms or more of a substance listed under 21 U.S.C. § 841(b)(1)(A)(ii), the sentencing court must impose a mandatory term of life imprisonment without release. 21 U.S.C. § 841(b). Marks argues that the District Court failed to follow the procedure mandated by 21 U.S.C. § 851(b), which requires the court to "inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information." Here Marks was asked not once, but was asked not once, but twice, as to whether he was challenging his three prior convictions, and he replied in the negative. Sentencing Hearing Tr. at 10, 11. Later he changed his mind and asserted a desire to challenge the prior convictions. The District court declined to allow him to do so. *See* Sentencing Hearing Tr. at 29, 85. We think the District Court's ruling is correct for two reasons, either one of which is a sufficient ground for sustaining the ruling.

First, § 851(c)(1) clearly states that "[i]f the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, *he shall file a written response* to the information." 21 U.S.C. § 851(c)(1) (emphasis added). There is no indication in the record that defendant complied with this requirement. Second, § 21 U.S.C. § 851(e) states that "[n]o person who

stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction." Sister circuits have held that "[a] trial court is not required 'to adhere to the rituals of § 851(b) where a defendant, as a matter of law, is precluded from attacking the conviction forming the basis of the enhancement information.' " *United States v. Weaver*, 905 F.2d 1466, 1482 (11th Cir. 1990) (quoting *United States v. Nanez*, 694 F.2d 405, 413 (5th Cir. 1982), *cert. denied*, 461 U.S. 909 (1983)), *cert. denied*, 498 U.S. 1091 (1991). In the present case the information alleging the prior conviction was filed on October 30, 1992. Doc. 187, Appellee's Appendix at 21. Defendant's 1984 and 1986 convictions, all that are necessary for the operation of 21 U.S.C. § 841(b), are barred from challenge as having occurred more than five years previously. *See* 21 U.S.C. § 851(e). It therefore is of no consequence whether Marks might have successfully contested his 1990 conviction.

We conclude that Marks' claim of error lacks merit.

III.

Marks objects to the District Court's finding that five or more kilograms of cocaine were involved in the cocaine-distribution conspiracy to which he pled guilty and argues that proof should have been based on more than a preponderance of the evidence. It is clear, however, that we have "rejected the argument that the sentencing phase requires a more stringent standard of proof than a preponderance of the evidence." *United States v.*

Galloway, 976 F.2d 414, 425 (8th Cir. 1992) (en banc), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1420 (1993). Here the determination by the District Court as to the amount of cocaine involved was a finding of fact which we must accept unless it is clearly erroneous. *United States v. Alexander*, 982 F.2d 262, 267 (8th Cir. 1992).

The District Court based its findings on information supplied by one of Marks' named co-conspirators, William Snyder, who stated that he had distributed fifteen kilograms or cocaine for Marks over the course of the conspiracy, and Michelle McDonald, an unindicted co-conspirator, who estimated that she had distributed ten to fifteen kilograms of the drug. Sentencing Hearing Tr. at 48, 49, 65. The District Court stated that it relied on the testimony of Snyder and McDonald in meeting the finding that five or more kilograms of cocaine had been involved in the conspiracy. Although Snyder contradicted his own earlier testimony, and received a reduced sentence as a result of his cooperation with the government, the court was entitled to credit his testimony, as well as McDonald's. *See United States v. Frondle*, 918 F.2d 62, 64-65 (8th Cir. 1990) (credibility for the district court to determine with due regard to testifier's criminal past and self-interest in testifying), *cert. denied*, 499 U.S. 941 (1991); *United States v. Phillippi*, 911 F.2d 149, 151 n.3 (8th Cir. 1990) (testimony of co-participant in offense who has become a government witness is sufficient evidence on which to base an increase in the quantity of drugs used for sentencing), *cert. denied*, 498 U.S. 1036 (1991); *United States v. Johnson*, 767 F.2d 1259, 1276 (8th Cir. 1985) (district court's discretion at sentencing largely unlimited as to kind of information considered or its source). In light

of the testimony before the sentencing court, we cannot say that the finding that five or more kilograms of cocaine were involved in the conspiracy is clearly erroneous.

IV.

Marks further submits that the trial court erred in allowing him to proceed *pro se* at his sentencing hearing. We disagree. A defendant is entitled to represent himself when he knowingly and intelligently forgoes his right to counsel. *Faretta v. California*, 422 U.S. 806, 821, 835 (1975); *Meyer v. Sargent*, 854 F.2d 1110, 1114 (8th Cir. 1988). Indeed, for the state to force defendant to accept an appointed counsel would be a violation of his constitutional rights. *Faretta*, 422 U.S. at 836. Determination of whether a defendant's election to proceed *pro se* is voluntary, knowing, and intelligent depends upon the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused. *Edwards v. Arizona*, 451 U.S. 477, 482 (1981); *Meyer*, 854 F.2d at 1114. While this court has not held that "a specific warning on the record of the dangers and disadvantages of self-representation" is an absolute necessity, it is required that in its absence "the record shows that the defendant had this required knowledge from other sources." *Meyer*, 854 F.2d at 1114.

Here Marks received a specific warning on the record when the court heard defendant's motion to proceed *pro se* at trial. "I think you would make a tremendous mistake to try and represent yourself in this case. It's almost like a surgeon doing major surgery on himself. You're not

familiar with the procedures . . . involved in a criminal case. You're not familiar with the Federal Rules of Evidence. I don't think that you would be competent to pass on the correctness or appropriateness of instructions." Brief for Appellee at 41. Similarly, at sentencing, the court noted, in regard to defendant's decision to represent himself, "I'm going to advise you I think it's a very poor judgment on your part. . . . Mr. Carter [Marks' appointed counsel] is trained in the law, understands procedures in regard to a hearing. He understands the law. I don't think you have any expertise in the law whatsoever." Sentencing Hearing Tr. at 4. Marks was thus not warned once, but twice, of the dangers of *pro se* representation. This court has previously noted that "[s]entencing hearings demand much less specialized knowledge than trials" for the *pro se* attorney. *United States v. Day*, 998 F.2d 622, 626 (8th Cir. 1993), *cert. denied*, ___U.S. ___ 114 S. Ct. 2140 (1994). Here, the defendant was adequately warned of the pitfalls of *pro se* representation, and he has failed to show that his election to represent himself was anything other than voluntary, knowing, and intelligent (in the limited sense in which that term is used in this context). That he may have lacked the skills and the knowledge of the law necessary to do a first-rate job is irrelevant. *Faretta*, 422 U.S. at 836. We conclude that Marks' claim of error cannot be sustained.

V.

Marks finally argues that the District Court erred in applying 21 U.S.C. § 841's mandatory life sentence as no evidence was presented at the sentencing hearing to establish clearly that any cocaine transaction took place

after the effective date of that section. The amendment was enacted on 18 November 1988 became effective 120 days later. Marks would therefore be liable to a mandatory lifetime sentence, he argues, only if evidence at the sentencing hearing established that an act covered by 21 U.S.C. § 841 (a) occurred after this effective date, as any retroactive application of increased punishment would violate the Ex Post Facto Clause, U.S. Const. Art. 1, § 9, cl. 2; *see Miller v. Florida,* 482 U.S. 423 (1987). We have recently noted that " '[i]t is well established that a statute increasing a penalty with respect to a criminal conspiracy which commenced prior to, but was continued beyond the effective date of the statute, is not ex post facto as to that crime.' " *United States v. Cooper,* No. 92-3501, slip op. at 6 (8th Cir. Aug. 29, 1994). Moreover, in an analogous situation

> it has been held that applying the Sentencing Guidelines to a conspiracy that straddles the Sentencing Guidelines' effective date is not violative of the ex post facto clause. We have noted that with conspiracy and other continuing offenses it is the completion date of the of offense that controls the use of the Sentencing Guidelines to be applied.

Id. (citations omitted). In the present case, Marks' guilty plea to Count 1, charging a conspiracy to distribute from June 1987 to July 1991, establishes that the conspiracy, and Marks' participation in it, continued long after the effective date of the amendment to 21 U.S.C. § 841. As we already have held in part III of this opinion, the finding of the District Court that the conspiracy involved five or more kilograms of cocaine is not clearly erroneous. And as discussed in part II of this opinion, Marks has two

prior felony drug convictions. The District Court therefore was required to impose the mandatory life sentence, and Marks' *ex post facto* claim is meritless.

VI.

Having considered all of Marks' arguments, we affirm the judgment of the District Court in all respects.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-2017WMS

United States of America,	*	
	*	Order Denying Petition
Appellee,	*	for Rehearing and
	*	Suggestion for Rehearing
v.	*	En Banc
	*	
Russell B. Marks,	*	
	*	
Appellant.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

December 12, 1994

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit